United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1416

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

WILFREDO PAGAN,

Appellant.

BRIEF FOR APPELLANT WILFREDO PAGAN

Appeal from A Judgment of
Conviction in The United
States District Court For
The Southern District of
New York

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-v-

Docket No.
76-1416

WILFREDO PAGAN,

Appellant.

----------X

BRIEF FOR APPELLANT WILFREDO PAGAN

Wilfredo Pagan appeals from his conviction on September 8, 1976 in the United States District Court for the Southern District of New York (Griesa, J.) upon a jury verdict on one count of conspiring to violate the narcotics laws. 21 U.S.C. 846. His sentence was two years, but the court suspended execution and imposed probation for five years after Pagan had already served three months at Danbury for observation and study under a 18 U.S.C. 5010(e) commitment. Counsel on this appeal is assigned under the C.J.A.

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in failing to give a contemporaneous instruction to the jury on the limited effect of other crime proof? We argue in addition that such proof should not have been admitted at all.

2. Whether the evidence was sufficient for the jury to find beyond a reasonable doubt that Pagan was guilty of the conspiracy charged? That evidence, we submit, showed an attempted "rip-off", as in United States v. Bertolotti, 529 F.2d 149 (2d Cir. 1975), not

a narcotics conspiracy.

STATEMENT OF FACTS

In May and June, 1975 Carlos Lopera, Peter Castro and Wilfredo Pagan discussed a cocaine sale with Puerto Rican Drug Enforcement Agents Fortunato Jorge and Felix Jimenez, arranged through informent Brenda Marchand. Lopera, the principal, and Castro did in fact sell an eighth of cocaine. Pagan, was not involved in that. There was movement toward what appeared to be a second sale. Crediting the Government's version Pagan did play a role in that. It was never consummated, however, and on the face of the evidence was really a buyer "rip-off" rather than a narcotics transaction.

The result was the arrest of defendants and Indictment 75 Cr. 638 (A 4)*, charging all three with conspiracy to violate the narcotics laws (Count One), and charging Lopera and Castro with unlawful cocaine possession and distribution in a second count. Castro pleaded guilty before trial; Lopera fled the jurisdiction. After a four day trial the jury convicted Pagan of the conspiracy charged.

The facts, viewed as we must most favorably to the Government, can be best stated in diary form. It is sufficient at this point to state merely the highlights. We concentrate on further details in Point II, when we demonstrate that the Government proved Pagan's

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* Numbered references, without more, are to the trial transcript. A designates the Appendix to this Brief.

involvement in a rip-off, not a conspiracy to violate the narcotics laws.

May 25, 1975: While in Puerto Rico Lopera agrees to sell four kilos of cocaine to Jorge, the DEA agent (82). The next day he cancels (50), but advises he will obtain cocaine in New York and sell it to Jorge.

June 1*: Pagan tells Brenda Marchand that he knows about her from Lopera and Castro (51).

June 3: Pagan tells Brenda he will be willing to carry the cocaine Lopera sells to Jorge back to Puerto Rico (52). At Brenda's request Pagan takes Brenda's telephone number to Lopera when he returns to New York.

June 5: Pagan telephones Brenda in Puerto Rico, tells her Lopera is working on the deal, and asks her to call him later so he can earn some money transporting the cocaine to Puerto Rico (55-56).

June 11-13: Lopera tells Jorge, Brenda and Jimenez (the other agent) to come to New York so he can sell them ten kilos, (82-84, 88). They do so.

June 18: Lopera agrees to sell Jorge four kilos and Jimenez three (92) with delivery on the 19th, later changed to the 20th. They also agree to buy an eighth for $4,000 as a sample. That last transaction is consumated (93-94). Pagan is present while the pickup

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* This and a few of the other dates are approximate.

is made, but there is no testimony of his involvement in any way in the transaction.

June 20: Pagan tells Jorge that Lopera is in Yonkers making the pick up and will call Jorge at his hotel as soon as he gets back (102).

Lopera tells Jimenez the seven kilo deal is dead but he can sell another eighth for $3,800.00 (195). Jimenez sees a sample at Lopera's apartment. Pagan is present there, participates in the discussions, and purportedly the cocaine is to come from his friend (196-197). Nothing else happens. Jimenez then arrests all three, Lopera, Castro and Pagan.

Two other elements completed the Government's proof. In February 1974 Pagan had made two cocaine sales in Florida to a police officer named Valladares. He was arrested, charged with two sales and pleaded guilty to one of them. Valladares testified to these as similar act proof. The district court gave no limiting instruction of the time, but did so later in its charge to the jury.

In addition Pagan testified before the Grand Jury and at trial that he was on the fire escape during the June 20 discussions at Lopera's apartment, and did not participate in them. Two surveillance agents testified that they could see the fire escape and he was not on it (285-86, 301).

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN FAILING TO GIVE A LIMITING INSTRUCTION WHEN IT ADMITTED INTO EVIDENCE PAGAN'S 1974 DEALINGS WITH OFFICER VALLADARES. IN ADDITION THAT EVIDENCE SHOULD NOT HAVE BEEN BEFORE THE JURY

This Circuit has probably been as liberal as any in permitting evidence of other crimes to evince motive, intent, knowledge or absence of mistake or accident, although not to show bad character, unless the potential prejudice outweighs the probative worth. F.R. Evidence 404(b), 403; United States v. Papadakis, 510 F.2d 287 (2d Cir. 1975); United States v. Torres, 519 F. 2d 723 (2d Cir. 1975); United States v. Bermudez, 526 F.2d 89 (2d Cir. 1975); United States v. Miranda, 526 F.2d 1319 (2d Cir. 1975); United States v. Braverman, 376 F.2d 249 (2d Cir. 1967); United States v. Deaton, 381 F.2d 114 (2d Cir. 1967). Compare United States v. Clemons, 503 F.2d 486 (8th Cir. 1974). This Court has insisted, however, that the trial judge properly instruct the jury with respect to the limited purpose for which the evidence is admitted. United States v. Papadakis, 510 F.2d at 295; United States v. Klein, 340 F.2d 547, 549 (2d Cir. 1965); United States v. Gerry, 515 F.2d 130,141 (2d Cir. 1975)

We have argued to a different panel, that it is not enough for the limiting instruction to be given only at the end of the case in the court's charge, as happened below (A 26-27). That instruction should also be given at the time the jury hears the evidence. United States v. Sadowski, Docket No. 76-1097, argued

September 14, 1976, decision reserved. Otherwise, the original impact of the evidence may well be exactly that which Rule 404 (b) prohibits, with such effect not removable later by the general cautionary instruction.

Here, the District Court mentioned in passing that the similar crime evidence bore "simply on the state of mind of the defendant." That was not a limiting instruction which would have sufficed for the charge (compare A 26-27), and, we submit, could not fulfill the requirement we are talking about now.

The need for a contemporaneous limiting instruction was especially important in this case. The proof from Valladares was devastating. The Government brought out (a) that on February 2, 1974 Pagan offered to sell Valladares cocaine stashed in Pagan's apartment (309); (b) that on February 3, Pagan met Valladares in the apartment, brought three aluminum foils of cocaine from the bedroom, offered to let Valladares "check it out", and assured him that the "count" in the packages was the same (310-11);* (c) that on February 6, Pagan arranged to sell one ounce of cocaine to Valladares. In the conversation Pagan identified his source of supply and said: "we're getting ready to move some real dope." (314); (d) that on February 12, Pagan again sold cocaine to Valladares (316); and (e) that Pagan was then arrested and later pleaded guilty to the sale (317).

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* Valladares testified (310): "the deal went strictly by Mr. Pagan and I. I received the contraband from Mr. Pagan and the pay was made directly to Mr. Pagan."

This Court has noted, although in the context of the Government's use of prior convictions to attack credibility, that those who suffer the greatest prejudice from evidence of similar crimes are narcotics defendants because of the general belief that they "are likely to be habitual offenders." United States v. Puco, 453 F.2d 539, 542 n.9 (2d Cir. 1971). In light thereof, the District Court should not have admitted the Valladares testimony. Its effect was to guarantee a conviction, without really assisting the deliberations on the basic issue of whether Pagan had joined a conspiracy or was merely participating in a rip off. United States v. Falley, 489 F.2d 33 (2d Cir. 1973). At the very minimum, however, the Court should have properly cautioned the jury, and its failure to do so was error.

POINT II

THE SECOND SALE WAS A BERTOLOTTI TYPE RIPOFF, NOT A NARCOTICS TRANSACTION

The Government's burden was to demonstrate beyond a reasonable doubt that Pagan was an actual participant in Lopera's venture, within its outcome. It is clear enough that up through and including the June 18 sale of the eighth, that was not the case.

The key is that although Pagan was apparently talking to Marchand on the one side and Lopera on the other, all such talk was preparatory and hypothetical only. The thrust was that if there was a sale to Jorge or Jimenez, he (Pagan) should be let into the transaction at that point to earn a fee carrying the cocaine to Puerto Rico. Marchand's testimony was specific (55):

> "Mr. Freddie Pagan asked me that, please, if we transacted the business to call him because he also was in need of earning some money and that he wanted to become independent and be in his own house in his own apartment."

Pagan had delivered a message from Lopera, but the message reflected direct dealings between Lopera and Marchand--not dealings in which Pagan had a part. Tr 55:

> "Mr. Freddie Pagan told me...Carlos Lopera would call me very soon because he (Lopera) already was working on the business that he had offered me in Puerto Rico. And as soon as he would be ready, he (Lopera) would call me."

Later events bore this out. It was Lopera who invited the agents and Brenda to New York, who negotiated with them in New York, and who received the money and delivered the eighth of cocaine to them in New York.

Pagan had no part, as further evidenced by the fact that he was not named in Count Two of the indictment, charging distribution on June 18 of the eighth; and there was no need for him to be involved in carrying the cocaine to Puerto Rico because the amount involved was so small, and the agents themselves could carry it back.

In short, if the Government's proof had gone no further than June 18, there would have been no case against Pagan. United States v. Aviles, 274 F.2d 179, 189-90 (2d Cir. 1960) (defendant Rodriguez); United States v. Reina, 242 F.2d 303, 306 (2d Cir. 1957) (defendant Valachi); United States v. Santore, 290 F.2d 51, 58, 78-79 (2d Cir. 1960) (attempt of defendants Tarlentino and Narducci to pick up a large shipment of pure heroin not sufficient to make out participation in conspiracy).

The case is not different because on June 20 there were negotiations for sale of another eighth, and Pagan allegedly was involved in those. By that date it was clear that Lopera wasn't really going to sell the agents anything and that the whole deal, except for the small $4000 transaction, was a rip-off. Thus, at the outset of the discussions, Lopera was going to sell Jorge four kilos (81); then it was six (83); then it was four for Jimenez (87); then it was "not only ten, but that he (has) a source for 40 kilos here in New York" (87); then it was "three associates: one had 25 kilos, the other 15 and the other 7 kilos" (91), and Jorge would buy "those seven instead of ten from other sources" (92) at a price of $26,000-$28,000 (94); then it was three deliver-

ies (94), then two (94), and then even these didn't take place (95).

The upshot was that on June 20 Jorge told Lopera (and Pagan who answered the phone once for him, 102), that everything was off, that he was going back to Puerto Rico, and that he wouldn't even buy another eighth which Lopera offered because "I came to New York, not to buy an eighth of cocaine but to buy ten or seven kilos of cocaine." (104). Jiminez proceeded further with what was by now obviously a setup. Lopera refused to have any further dealings at the agent's hotel, as he had done on the sale of the eighth (93) but insisted that the agents come to his apartment on the Lower East Side (103-04). Then the drugs were supposed to come from someone named Pamela--a friend of Lopera's, not Pagan's (208-09). Instead, at the apartment Jiminez was told the drugs were to come from a friend of Pagan's (196). When Jiminez wanted to ascertain if the "friend" could deliver the drugs to the hotel, Pagan left to find the friend but reported "that the friend was not there" (197). Although Lopera gave Jiminez a sample, no drugs were delivered, or monies paid, and, we believe, no drugs were found either in the apartment or on the person of defendants.

The only transaction, then, in which Pagan was involved, was a non-transaction. It could not sustain a conspiracy charge. See United States v. Bertolotti, 529 F. 2d 149,155 (2d Cir. 1975): "The Matthews-Harrison and Lucas matters, indeed, could hardly be classified as narcotics transactions, for no drugs changed hands."

CONCLUSION

This Court should reverse the judgment below and direct dismissal of the indictment.

Respectfully submitted,

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